

ASSEMBLY BILL

No. 1763

Introduced by Assembly Member Lieu

February 9, 2010

An act to amend Sections 12301.6 and 12305.86 of, and to add Section 12305.87 to, the Welfare and Institutions Code, relating to public social services, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 1763, as introduced, Lieu. In-home supportive services.

Existing law provides for the county-administered In-Home Supportive Services (IHSS) program, under which qualified aged, blind, and disabled persons are provided with services in order to permit them to remain in their own homes and avoid institutionalization. Existing law permits services to be provided under the IHSS program either through the employment of individual providers, a contract between the county and an entity for the provision of services, the creation by the county of a public authority, or a contract between the county and a nonprofit consortium.

The IHSS program is administered at the statewide level by the State Department of Social Services. Existing law requires the department to convene periodic meetings in which supportive services recipients, providers, advocates, IHSS provider representatives, organizations representing recipients, counties, public authorities, nonprofit consortia, and other interested stakeholders may receive information and have the opportunity to provide input to the department regarding the quality assurance, program integrity, and program consistency efforts, as specified.

This bill would require the department, in consultation and coordination with county welfare departments, to establish guidelines to provide counties with instructions to consistently and accurately comply with the requirements of the IHSS program.

Existing law requires that criminal background checks be conducted for prospective and existing IHSS providers.

This bill would require a county to issue a certificate to a prospective or existing provider certifying that the individual has been deemed eligible for payment after clearing a criminal background check. The bill would require other counties to accept the certificate in lieu of a separate criminal background check. By imposing new duties on counties, this bill would create a state-mandated local program.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that, if the Commission on State Mandates determines that the bill contains costs mandated by the state, reimbursement for those costs shall be made pursuant to these statutory provisions.

This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.

State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

3 (a) The In-Home Supportive Services (IHSS) program provides
4 people who are blind, disabled, or over 65 years of age with
5 personal assistance and in-home supportive services so they can
6 live safely in their homes and avoid unnecessary and expensive
7 institutional care.

8 (b) IHSS is an entitlement program that is regulated by state
9 and federal laws and regulations. To be eligible, consumers must
10 be assessed and found to be aged (65 years of age or older), blind,
11 or disabled (as determined by the Social Security Administration)
12 and are unable to remain safely in their own home without
13 assistance. Recipients must also be low income, meeting the
14 income requirements consistent with eligibility for Medi-Cal.

1 (c) Both federal and state laws require the IHSS program to be
2 administered in a manner that assures that services are comparable
3 in amount, duration, and scope in every county.

4 (d) IHSS is a complex program and has undergone substantial
5 changes over the past five years. Mechanisms have been put in
6 place to improve IHSS program integrity with the enactment the
7 IHSS Quality Assurance Initiative (Chapter 229, Statutes of 2004)
8 and the antifraud initiative (Chapter 17, Statutes of 2009).

9 (e) Despite these statutory changes, variations and differences
10 continue to exist between the 58 counties in their administration
11 of the IHSS program.

12 SEC. 2. Section 12301.6 of the Welfare and Institutions Code
13 is amended to read:

14 12301.6. (a) Notwithstanding Sections 12302 and 12302.1, a
15 county board of supervisors may, at its option, elect to do either
16 of the following:

17 (1) Contract with a nonprofit consortium to provide for the
18 delivery of in-home supportive services.

19 (2) Establish, by ordinance, a public authority to provide for
20 the delivery of in-home supportive services.

21 (b) (1) To the extent that a county elects to establish a public
22 authority pursuant to paragraph (2) of subdivision (a), the enabling
23 ordinance shall specify the membership of the governing body of
24 the public authority, the qualifications for individual members, the
25 manner of appointment, selection, or removal of members, how
26 long they shall serve, and other matters as the board of supervisors
27 deems necessary for the operation of the public authority.

28 (2) A public authority established pursuant to paragraph (2) of
29 subdivision (a) shall be both of the following:

30 (A) An entity separate from the county, and shall be required
31 to file the statement required by Section 53051 of the Government
32 Code.

33 (B) A corporate public body, exercising public and essential
34 governmental functions and that has all powers necessary or
35 convenient to carry out the delivery of in-home supportive services,
36 including the power to contract for services pursuant to Sections
37 12302 and 12302.1 and that makes or provides for direct payment
38 to a provider chosen by the recipient for the purchase of services
39 pursuant to Sections 12302 and 12302.2. Employees of the public
40 authority shall not be employees of the county for any purpose.

1 (3) (A) As an alternative, the enabling ordinance may designate
2 the board of supervisors as the governing body of the public
3 authority.

4 (B) Any enabling ordinance that designates the board of
5 supervisors as the governing body of the public authority shall
6 also specify that no fewer than 50 percent of the membership of
7 the advisory committee shall be individuals who are current or
8 past users of personal assistance services paid for through public
9 or private funds or recipients of services under this article.

10 (C) If the enabling ordinance designates the board of supervisors
11 as the governing body of the public authority, it shall also require
12 the appointment of an advisory committee of not more than 11
13 individuals who shall be designated in accordance with
14 subparagraph (B).

15 (D) Prior to making designations of committee members
16 pursuant to subparagraph (C), or governing body members in
17 accordance with paragraph (4), the board of supervisors shall solicit
18 recommendations of qualified members of either the governing
19 body of the public authority or of any advisory committee through
20 a fair and open process that includes the provision of reasonable
21 written notice to, and a reasonable response time by, members of
22 the general public and interested persons and organizations.

23 (4) If the enabling ordinance does not designate the board of
24 supervisors as the governing body of the public authority, the
25 enabling ordinance shall require the membership of the governing
26 body to meet the requirements of subparagraph (B) of paragraph
27 (3).

28 (c) (1) Any public authority created pursuant to this section
29 shall be deemed to be the employer of in-home supportive services
30 personnel referred to recipients under paragraph (3) of subdivision
31 (e) within the meaning of Chapter 10 (commencing with Section
32 3500) of Division 4 of Title 1 of the Government Code. Recipients
33 shall retain the right to hire, fire, and supervise the work of any
34 in-home supportive services personnel providing services to them.

35 (2) (A) Any nonprofit consortium contracting with a county
36 pursuant to this section shall be deemed to be the employer of
37 in-home supportive services personnel referred to recipients
38 pursuant to paragraph (3) of subdivision (e) for the purposes of
39 collective bargaining over wages, hours, and other terms and
40 conditions of employment.

1 (B) Recipients shall retain the right to hire, fire, and supervise
2 the work of any in-home supportive services personnel providing
3 services for them.

4 (d) A public authority established pursuant to this section or a
5 nonprofit consortium contracting with a county pursuant to this
6 section, when providing for the delivery of services under this
7 article by contract in accordance with Sections 12302 and 12302.1
8 or by direct payment to a provider chosen by a recipient in
9 accordance with Sections 12302 and 12302.2, shall comply with
10 and be subject to, all statutory and regulatory provisions applicable
11 to the respective delivery mode.

12 (e) Any nonprofit consortium contracting with a county pursuant
13 to this section or any public authority established pursuant to this
14 section shall provide for all of the following functions under this
15 article, but shall not be limited to those functions:

16 (1) The provision of assistance to recipients in finding in-home
17 supportive services personnel through the establishment of a
18 registry.

19 (2) (A) (i) The investigation of the qualifications and
20 background of potential personnel. Upon the effective date of the
21 amendments to this section made during the 2009–10 Fourth
22 Extraordinary Session of the Legislature, the investigation with
23 respect to any provider in the registry or prospective registry
24 applicant shall include criminal background checks requested by
25 the nonprofit consortium or public authority and conducted by the
26 Department of Justice pursuant to Section 15660, for those public
27 authorities or nonprofit consortia using the agencies on the effective
28 date of the amendments to this section made during the 2009–10
29 Fourth Extraordinary Session of the Legislature. Criminal
30 background checks shall be performed no later than July 1, 2010,
31 for any provider who is already on the registry on the effective
32 date of amendments to this section made during the 2009–10 Fourth
33 Extraordinary Session of the Legislature, for whom a criminal
34 background check pursuant to this section has not previously been
35 provided, as a condition of the provider’s continued enrollment in
36 the IHSS program. Criminal background checks shall be conducted
37 at the provider’s expense.

38 (ii) Upon notice from the Department of Justice notifying the
39 public authority or nonprofit consortium that the prospective
40 registry applicant has been convicted of a criminal offense specified

1 in Section 12305.81, the public authority or nonprofit consortium
2 shall deny the request to be placed on the registry for providing
3 supportive services to any recipient of the In-Home Supportive
4 Services program.

5 (B) (i) If an applicant or provider is rejected as a result of
6 information contained in the criminal background report, the
7 applicant or provider shall receive a copy of his or her own criminal
8 history record from the Department of Justice, as provided in
9 Article 5 (commencing with Section 11120) of Chapter 1 of Title
10 1 of Part 4 of the Penal Code, to review the information for
11 accuracy and completeness. The applicant or provider shall be
12 advised that if, upon review of his or her own criminal history
13 record he or she finds the information to be inaccurate or
14 incomplete, the applicant or provider shall have the right to submit
15 a formal challenge to the Department of Justice to contest the
16 criminal background report.

17 (ii) The department shall develop a written appeal process for
18 the current and prospective providers who are determined ineligible
19 to receive payment for the provision of services in the In-Home
20 Supportive Services program.

21 (C) An applicant shall be informed of his or her right to a waiver
22 of the fee for obtaining a copy of a criminal history record, and of
23 how to submit a claim and proof of indigency, as required by
24 Section 11123 of the Penal Code.

25 (D) Nothing in this paragraph shall be construed to prohibit the
26 Department of Justice from assessing a fee pursuant to Section
27 11105 or 11123 of the Penal Code to cover the cost of furnishing
28 summary criminal history information.

29 (E) As used in this section, “nonprofit consortium” means a
30 nonprofit public benefit corporation that has all powers necessary
31 to carry out the delivery of in-home supportive services under the
32 delegated authority of a government entity.

33 (F) *A county shall issue a certificate to an individual described*
34 *in clause (i) of subparagraph (A), certifying that the individual*
35 *has been deemed eligible to receive payment for providing services*
36 *pursuant to this article, after clearing a criminal background*
37 *check. Other counties shall accept the certificate in lieu of a*
38 *separate criminal background check.*

39 (3) Establishment of a referral system under which in-home
40 supportive services personnel shall be referred to recipients.

1 (4) Providing for training for providers and recipients.

2 (5) (A) Performing any other functions related to the delivery
3 of in-home supportive services.

4 (B) (i) Upon request of a recipient of in-home supportive
5 services pursuant to this chapter, or a recipient of personal care
6 services under the Medi-Cal program pursuant to Section 14132.95,
7 a public authority or nonprofit consortium may provide a criminal
8 background check on a nonregistry applicant or provider from the
9 Department of Justice, in accordance with clause (i) of
10 subparagraph (A) of paragraph (2) of subdivision (e). If the person
11 who is the subject of the criminal background check is not hired
12 or is terminated because of the information contained in the
13 criminal background report, the provisions of subparagraph (B)
14 of paragraph (2) of subdivision (e) shall apply.

15 (ii) A recipient of in-home supportive services pursuant to this
16 chapter or a recipient of personal care services under the Medi-Cal
17 program may elect to employ an individual as their service provider
18 notwithstanding the individual's record of previous criminal
19 convictions, unless those convictions include any of the offenses
20 specified in Section 12305.81.

21 (6) Ensuring that the requirements of the personal care option
22 pursuant to Subchapter 19 (commencing with Section 1396) of
23 Chapter 7 of Title 42 of the United States Code are met.

24 (f) (1) Any nonprofit consortium contracting with a county
25 pursuant to this section or any public authority created pursuant
26 to this section shall be deemed not to be the employer of in-home
27 supportive services personnel referred to recipients under this
28 section for purposes of liability due to the negligence or intentional
29 torts of the in-home supportive services personnel.

30 (2) In no case shall a nonprofit consortium contracting with a
31 county pursuant to this section or any public authority created
32 pursuant to this section be held liable for action or omission of any
33 in-home supportive services personnel whom the nonprofit
34 consortium or public authority did not list on its registry or
35 otherwise refer to a recipient.

36 (3) Counties and the state shall be immune from any liability
37 resulting from their implementation of this section in the
38 administration of the In-Home Supportive Services program. Any
39 obligation of the public authority or consortium pursuant to this
40 section, whether statutory, contractual, or otherwise, shall be the

1 obligation solely of the public authority or nonprofit consortium,
2 and shall not be the obligation of the county or state.

3 (g) Any nonprofit consortium contracting with a county pursuant
4 to this section shall ensure that it has a governing body that
5 complies with the requirements of subparagraph (B) of paragraph
6 (3) of subdivision (b) or an advisory committee that complies with
7 subparagraphs (B) and (C) of paragraph (3) of subdivision (b).

8 (h) Recipients of services under this section may elect to receive
9 services from in-home supportive services personnel who are not
10 referred to them by the public authority or nonprofit consortium.
11 Those personnel shall be referred to the public authority or
12 nonprofit consortium for the purposes of wages, benefits, and other
13 terms and conditions of employment.

14 (i) (1) Nothing in this section shall be construed to affect the
15 state's responsibility with respect to the state payroll system,
16 unemployment insurance, or workers' compensation and other
17 provisions of Section 12302.2 for providers of in-home supportive
18 services.

19 (2) The Controller shall make any deductions from the wages
20 of in-home supportive services personnel, who are employees of
21 a public authority pursuant to paragraph (1) of subdivision (c), that
22 are agreed to by that public authority in collective bargaining with
23 the designated representative of the in-home supportive services
24 personnel pursuant to Chapter 10 (commencing with Section 3500)
25 of Division 4 of Title 1 of the Government Code and transfer the
26 deducted funds as directed in that agreement.

27 (3) Any county that elects to provide in-home supportive
28 services pursuant to this section shall be responsible for any
29 increased costs to the in-home supportive services case
30 management, information, and payrolling system attributable to
31 that election. The department shall collaborate with any county
32 that elects to provide in-home supportive services pursuant to this
33 section prior to implementing the amount of financial obligation
34 for which the county shall be responsible.

35 (j) To the extent permitted by federal law, personal care option
36 funds, obtained pursuant to Subchapter 19 (commencing with
37 Section 1396) of Chapter 7 of Title 42 of the United States Code,
38 along with matching funds using the state and county sharing ratio
39 established in subdivision (c) of Section 12306, or any other funds
40 that are obtained pursuant to Subchapter 19 (commencing with

1 Section 1396) of Chapter 7 of Title 42 of the United States Code,
2 may be used to establish and operate an entity authorized by this
3 section.

4 (k) Notwithstanding any other provision of law, the county, in
5 exercising its option to establish a public authority, shall not be
6 subject to competitive bidding requirements. However, contracts
7 entered into by either the county, a public authority, or a nonprofit
8 consortium pursuant to this section shall be subject to competitive
9 bidding as otherwise required by law.

10 (l) (1) The department may adopt regulations implementing
11 this section as emergency regulations in accordance with Chapter
12 3.5 (commencing with Section 11340) of Part 1 of Division 3 of
13 Title 2 of the Government Code. For the purposes of the
14 Administrative Procedure Act, the adoption of the regulations shall
15 be deemed an emergency and necessary for the immediate
16 preservation of the public peace, health and safety, or general
17 welfare. Notwithstanding Chapter 3.5 (commencing with Section
18 11340) of Part 1 of Division 3 of Title 2 of the Government Code,
19 these emergency regulations shall not be subject to the review and
20 approval of the Office of Administrative Law.

21 (2) Notwithstanding subdivision (h) of Section 11346.1 and
22 Section 11349.6 of the Government Code, the department shall
23 transmit these regulations directly to the Secretary of State for
24 filing. The regulations shall become effective immediately upon
25 filing by the Secretary of State.

26 (3) Except as otherwise provided for by Section 10554, the
27 Office of Administrative Law shall provide for the printing and
28 publication of these regulations in the California Code of
29 Regulations. Emergency regulations adopted pursuant to this
30 subdivision shall remain in effect for no more than 180 days.

31 (m) (1) In the event that a county elects to form a nonprofit
32 consortium or public authority pursuant to subdivision (a) before
33 the State Department of Health Care Services has obtained all
34 necessary federal approvals pursuant to paragraph (3) of
35 subdivision (j) of Section 14132.95, all of the following shall apply:

36 (A) Subdivision (d) shall apply only to those matters that do
37 not require federal approval.

38 (B) The second sentence of subdivision (h) shall not be
39 operative.

1 (C) The nonprofit consortium or public authority shall not
2 provide services other than those specified in paragraphs (1), (2),
3 (3), (4), and (5) of subdivision (e).

4 (2) Paragraph (1) shall become inoperative when the State
5 Department of Health Care Services has obtained all necessary
6 federal approvals pursuant to paragraph (3) of subdivision (j) of
7 Section 14132.95.

8 (n) (1) One year after the effective date of the first approval by
9 the department granted to the first public authority, the Bureau of
10 State Audits shall commission a study to review the performance
11 of that public authority.

12 (2) The study shall be submitted to the Legislature and the
13 Governor not later than two years after the effective date of the
14 approval specified in subdivision (a). The study shall give special
15 attention to the health and welfare of the recipients under the public
16 authority, including the degree to which all required services have
17 been delivered, out-of-home placement rates, prompt response to
18 recipient complaints, and any other issue the director deems
19 relevant.

20 (3) The report shall make recommendations to the Legislature
21 and the Governor for any changes to this section that will further
22 ensure the well-being of recipients and the most efficient delivery
23 of required services.

24 (o) Commencing July 1, 1997, the department shall provide
25 annual reports to the appropriate fiscal and policy committees of
26 the Legislature on the efficacy of the implementation of this
27 section, and shall include an assessment of the quality of care
28 provided pursuant to this section.

29 (p) (1) Notwithstanding any other provision of law, and except
30 as provided in paragraph (2), the department shall, no later than
31 January 1, 2009, implement subparagraphs (A) and (B) through
32 an all county letter from the director:

33 (A) Subparagraphs (A) and (B) of paragraph (2) of subdivision
34 (e).

35 (B) Subparagraph (B) of paragraph (5) of subdivision (e).

36 (2) The department shall, no later than July 1, 2009, adopt
37 regulations to implement subparagraphs (A) and (B) of paragraph
38 (1).

39 (q) The amendments made to paragraphs (2) and (5) of
40 subdivision (e) made by the act that added this subdivision during

1 the 2007–08 Regular Session of the Legislature shall only be
2 implemented to the extent that an appropriation is made in the
3 annual Budget Act or other statute, except for the amendments
4 that added subparagraph (D) of paragraph (2) of subdivision (e),
5 which shall go into effect January 1, 2009.

6 SEC. 3. Section 12305.86 of the Welfare and Institutions Code
7 is amended to read:

8 12305.86. (a) Effective October 1, 2009, a county shall
9 investigate the background of a person who seeks to become a
10 supportive services provider and who is not listed on the registry
11 of a public authority or nonprofit consortium pursuant to Section
12 12301.6. This investigation shall include criminal background
13 checks conducted by the Department of Justice pursuant to Section
14 15660.

15 (b) No later than July 1, 2010, the county shall complete a
16 criminal background check pursuant to subdivision (a) for a
17 provider who is providing in-home supportive services prior to
18 October 1, 2009, and who is not listed on a public authority or
19 nonprofit consortium registry, as a condition of the provider's
20 continued enrollment in the IHSS program. Criminal background
21 checks shall be conducted at the provider's expense.

22 (c) Upon notice from the Department of Justice that a
23 prospective or current provider has been convicted of a criminal
24 offense specified in Section 12305.81, the county shall deny or
25 terminate the applicant's request to become a provider of
26 supportive services to any recipient of the In-Home Supportive
27 Services program.

28 (1) If an applicant or provider is rejected as a result of
29 information contained in the criminal background report, the
30 applicant or provider shall receive a copy of his or her own criminal
31 history record from the Department of Justice, as provided in
32 Article 5 (commencing with Section 11120) of Chapter 1 of Title
33 1 of Part 4 of the Penal Code, to review the information for
34 accuracy and completeness. The applicant or provider shall be
35 advised that if, upon review of his or her own criminal history
36 record, he or she finds the information to be inaccurate or
37 incomplete, the applicant or provider shall have the right to submit
38 a formal challenge to the Department of Justice to contest the
39 criminal background report.

(2) The department shall develop a written appeal process for the current and prospective providers who are determined ineligible to receive payment for the provision of services under the In-Home Supportive Services program.

(3) An applicant shall be informed of his or her right to a waiver of the fee for obtaining a copy of a criminal history record, and of how to submit a claim and proof of indigency, as required by Section 11123 of the Penal Code.

(d) Nothing in this section shall be construed to prohibit the Department of Justice from assessing a fee pursuant to Section 11105 or 11123 of the Penal Code to cover the cost of furnishing summary criminal history information.

(e) A county shall issue a certificate to an individual as described in subdivisions (a) and (b) certifying that the individual has been deemed eligible to receive payment for providing services pursuant to this article, after clearing a criminal background check. Other counties shall accept the certificate in lieu of a separate criminal background check.

~~(e)~~

(f) The department shall seek federal financial participation, to the extent possible, to cover any costs associated with this section.

SEC. 4. Section 12305.87 is added to the Welfare and Institutions Code, to read:

12305.87. The department, in consultation and coordination with county welfare departments, and in accordance with Section 12305.72, shall establish guidelines to provide counties with instructions to consistently and accurately comply with the requirements of this article.

SEC. 5. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

SEC. 6. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order to ensure that IHSS program requirements, including criminal background checks, are uniformly and appropriately

- 1 applied to providers at the earliest possible time, it is necessary
- 2 for this act to take effect immediately.

O